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FOREWORD

HARMLESS ERROR REVIEW IN THE SECOND CIRCUIT*

Hon. John M. Walker, Jr.†

INTRODUCTION

The doctrine of harmless error is one of the most important doctrines in appellate decision making. Harmless error principles are employed in reviewing errors of all types, from improperly admitted evidence to serious constitutional errors.[1] It is quite possible that these principles determine the outcome of more criminal appeals than any other doctrine,[2] and recent Second Circuit cases make clear the central place of harmless error review in deciding an appeal.[3]

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[1] *See* Agard v. Portuondo, 117 F.3d 696, 717 (2d Cir. 1997) (Winter, J., concurring) (Van Graafeland, J., dissenting).

[2] *See* 2 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 7.01 (2d ed. 1986); *cf.* Peck v. United States, 102 F.3d 1319, 1327 (2d Cir. 1996) (en banc) (Newman, J., concurring) ("[a]ssessment of harmlessness is probably the single most recurring issue presented in [habeas corpus challenges to state court convictions]").

[3] *See, e.g.*, United States v. Knoll, 116 F.3d 994 (2d Cir. 1997); Peck v. United

Despite its pervasive presence, the appropriate methods for determining whether an error is harmless are still evolving, and are not without controversy.[4] Indeed, the Second Circuit Court of Appeals convened a rare en banc hearing in the August 1996 term to determine the harmless error analysis applicable on collateral review of an error in a jury instruction defining an offense.[5] Although the precise question presented to the court was ultimately determined by the Supreme Court prior to its decision,[6] Chief Judge Jon O. Newman wrote a separate concurrence to the resulting per curiam opinion pointing out the difficulties created by the lack of clarity in harmless error review of erroneous jury instructions. He explicitly requested that the Supreme Court articulate the proper method for determining when erroneous jury instructions are harmless.[7]

This brief foreword is not the place to canvass the formulations and application of harmless error review in all contexts.[8] However, it is useful to point out recent cases that are indica-

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[4] *See, e.g,* Carella v. California, 491 U.S. 263 (Scalia, J., concurring); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated?,* 70 N.Y.U. L. REV. 1167 (1996); James S. Liebman & Randy Hertz, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law,* 84 J. CRIM L. & CRIMINOLOGY 1109 (1994).

Controversy in the Second Circuit over the proper standard for determining when an error is harmless is not new. Judges Learned Hand and Jerome Frank engaged in a spirited dialogue over the proper standard for determining if an error at a criminal trial is harmless. *See, e.g.,* United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[5] *Peck,* 102 F.3d 1319 (2d. Cir. 1996) (en banc).

[6] *See* California v. Roy, 117 S. Ct. 337 (1996) (per curiam).

[7] *Peck,* 102 F.3d at 1327. The Second Circuit was not alone in struggling with determining the proper harmless error analysis applicable to erroneous jury instructions. The Ninth Circuit convened two en banc hearings in 1996 to grapple with the issue. *See* Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc), *judgment vacated* by California v. Roy, 117 S. Ct. 337 (1996) (per curiam); United States v. Keys, 95 F.3d 874 (9th Cir. 1996) *judgment vacated* by 117 S. Ct. 337 (1996). The Supreme Court vacated both decisions; however, even after the Court issued a decision in *Roy* and remanded, the en banc court found substantial uncertainty as to the correct mode of analysis in the Supreme Court's decision and ultimately decided that error in the jury instructions was harmless by only a one vote majority. Roy v. Gomez, 108 F.3d 242 (9th Cir. 1997), *cert. denied* Roy v. Maddock, 118 S. Ct. 196 (1997).

[8] *See, e.g.,* 28 U.S.C. § 2111 (1988); FED. R. CRIM. P. 52; FED. R. EVID. 103; FED. R. CIV. P. 61.

tive of harmless error review in criminal appeals in the Second Circuit, as well as to highlight some areas of uncertainty.

The quandary of harmless error review is that the reviewing court may not decide how it thinks the case should have been decided, absent the error, lest the defendant be deprived of her right to have a jury decide the issue. The appellate court must necessarily speculate as to what a jury would have found absent the error. However, once a judge considers the entire record, "[the] judge faces the risk of being influenced by that evidence" since "it is hard for a judge to discount a strong feeling that the defendant is guilty."[9] Consequently, although a jury is "uniquely situated by virtue of its very representation of the conscience of the community . . . to keep the community and its laws in reasonable harmony," its purpose may be nullified by harmless error review.[10] This creates a risk to the rights of individuals, both constitutional and non-constitutional, as appellate courts take a more guilt-based approach to reviewing errors.[11] Conversely, strict appellate reversal for error "encourages litigants to abuse the judicial process and bestirs the public to ridicule it."[12] Appellate courts need to maintain an appropriate balance so that they may "cleanse the judicial process of prejudicial error without becoming mired in harmless error."[13]

After a brief review of the harmless error doctrine, this foreword will discuss recent developments affecting the heretofore clear, but now more opaque, principle that if an error is "trial error" it is subject to harmless error review, but if it is "structural error" it is not. In conclusion, I will suggest that in light of the Supreme Court's recent decision in *Johnson v.*

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[9] Edwards, *supra* note 4, at 1205.

[10] TRAYNOR, *supra* note 4, at 32. However, Judge Traynor argued in his seminal essay on harmless error that appellate review of the evidence to determine if the error is harmless does not invade the province of the jury. According to Traynor, "[i]f the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains the verdict, *a fortiori* there is no invasion of the province of the jury." If an appellate court determines that the error did influence the jury and affected the verdict, then the defendant's right to have a jury trial is violated and a new trial is mandated, a decision clearly within the province of an appeals court. TRAYNOR, *supra* note 4, at 13.

[11] TRAYNOR, *supra* note 4, at 32.

[12] TRAYNOR, *supra* note 4, at 50.

[13] TRAYNOR, *supra* note 4, at 81.

United States[14] somewhat muddying the waters of harmless error analysis, the Supreme Court should consider revisiting certain open issues to clarify such review of future cases.

I. BACKGROUND

Harmless error review by appellate courts is one of the revolutionary features of modern legal jurisprudence.[15] Prior to the enactment of statutes and rules mandating harmless error review, American appellate courts, following the English practice, applied mechanical rules that reversed judgments no matter how trivial the error. This practice was based on the notion that the appellate court had no authority to weigh evidence or review the record to determine if an error was harmless. Dissatisfaction with appellate courts that "tower above the trials of criminal cases as impregnable citadels of technicality" led to the enactment of statutes preventing reversals when a defendant received a fair trial.[16] The purpose of reforming the system to permit harmless error review was clear:

> [T]o substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.[17]

Such harmless error review is now firmly embedded in appellate decisionmaking. Courts frequently invoke the maxim that "[a] defendant is entitled to a fair trial but not a perfect one" to note that it is no longer sufficient to discover errors in the printed record to obtain a reversal.[18] Instead, with very limited exceptions,[19] the error must have possibly affected the

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[14] 117 S. Ct. 544 (1997).

[15] *See* TRAYNOR, *supra* note 4, at 14; 2 CHILDRESS & DAVIS, *supra* note 2, § 7.03 at 6 ("Harmless error is probably the most far-reaching doctrinal change in American procedural jurisprudence since its inception.").

[16] Kotteakos v. United States, 328 U.S. 750, 759 (1946) (citing Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)).

[17] *Kotteakos*, 328 U.S. at 760.

[18] Lutwak v. United States, 344 U.S. 604, 619 (1953).

[19] *See infra* text accompanying notes 36-41.

outcome of the trial before an appeals court will reverse a conviction.

Harmless error review in criminal appeals is mandated by the United States Code[20] and the Federal Rules of Criminal Procedure. Rule 52 of the Federal Rules of Criminal Procedure lays out the basic framework governing harmless error review:

> Rule 52. Harmless Error and Plain Error
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.[21]

Rule 52(a) governs the review of error where a defendant has made a timely objection to an error in the trial court.[22] The standard for determining if a non-constitutional error is harmless on direct review is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[23] If a judge "has 'grave doubt' about whether an error affected a jury in this way, the judge must treat the error as if it did so."[24]

If the error is a constitutional error, the degree of certainty required on direct review before a court can declare it harmless is heightened. The Supreme Court held in *Chapman v. California*[25] that if such an error is to be deemed harmless "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[26] Irrespective of whether the error is constitutional or non-constitutional, on direct review the government bears the burden of showing the absence of prejudice under Rule 52(a).[27]

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[20] Section 2111 of Title 28 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994).

[21] FED. R. CRIM. P. 52.

[22] United States v. Olano, 507 U.S. 725, 734 (1993).

[23] *Kotteakos*, 328 U.S. at 776; *Peck*, 106 F.3d at 454; *see also* United States v. Thompson, 76 F.3d 442, 449-50 (2d Cir. 1996) (quoting *Kotteakos*, 328 U.S. at 765).

[24] O'Neal v. McAninch, 513 U.S. 432, 438 (1995) (quoting *Kotteakos*, 328 U.S. at 764-65).

[25] 386 U.S. 18 (1967).

[26] *Id.* at 24.

[27] *Olano*, 507 U.S. at 734; *O'Neal*, 513 U.S. at 436-37.

dice under Rule 52(a).[27]

Rule 52(b) governs the review of forfeited errors. The Supreme Court outlined the method for conducting plain error review under Rule 52(b) in *Olano v. United States*.[28] *Olano* set forth a four prong test to govern an appellate court's discretion in correcting an error not raised at trial. According to the test, there must be: (1) an "error," (2) that is "plain," (3) that "affect[s] substantial rights," and (4) if these three conditions are met, the court may then notice the forfeited error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[29] Under this test the defendant bears the burden of proving that the error was not harmless. However, in the Second Circuit, if the error becomes apparent on appeal because of a "supervening decision [after the trial which] alters a settled rule of law in [this] circuit, . . . the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant."[30]

On habeas review of a constitutional error, the need for finality, the importance of the trial itself, and concerns of comity and federalism in reviewing state court convictions led the Supreme Court to adopt a harmless error standard less stringent than that of the *Chapman* test.[31] Before the court can utilize any harmless error analysis, the defendant must satisfy the "cause and actual prejudice" standard of *United States v. Frady*.[32] Under this test, defendants must show "cause" which would excuse their failure to appeal the error and "actual prejudice" which occurred as a result.[33] Once a defendant can satisfy the *Frady* standard, a reviewing court must apply the test, set out by the Supreme Court in *Brecht v. Abrahamson*, of whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[34] This is the same,

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[27] *Olano*, 507 U.S. at 734; *O'Neal*, 513 U.S. at 436-37.

[28] 507 U.S. 725 (1993).

[29] *Id.* at 732 (citing United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))).

[30] United States v. Ballistrea, 101 F.3d 827, 835 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1327 (1997) (quoting United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994)).

[31] Brecht v. Abrahamson, 507 U.S. 619, 633-38 (1993).

[32] 456 U.S. 152, 167-68 (1982).

[33] *Id.* at 168.

[34] *Brecht*, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750,

lesser standard the Court set forth in *Kotteakos* to be applied on direct review of non-constitutional errors. But, if the reviewing court is in "grave doubt as to the harmlessness" of a constitutional error,[35] the petitioner wins. "Grave doubt" occurs where "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error."[36]

II. STRUCTURAL VERSUS TRIAL ERROR: THE APPLICABILITY OF HARMLESS ERROR REVIEW

Prior to the Supreme Court's decision in *Johnson v. United States*,[37] the first task for a court reviewing an error was to determine if the error was a "structural" or a "trial" error. Structural errors are fundamental defects that affect the entire "framework within which the trial proceeds, rather than simply an error in the trial process itself."[38] An error is structural when it is of sufficient consequence that the criminal process " 'cannot reliably serve its function as a vehicle for determination of guilt or innocence.' "[39] The Supreme Court has found structural errors "only in a very limited class of cases."[40] Examples include the total deprivation of the right to counsel and an erroneous reasonable doubt instruction.[41] According to the Supreme Court, structural errors "defy analysis by 'harmless error' standards"[42] and, at least prior to the Court's decision in *Johnson*, the existence of structural errors "require[d] automatic reversal of the conviction because they infect the entire

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776 (1946)).

[35] *O'Neal*, 513 U.S. at 445 (1995).

[36] *Id.* at 435.

[37] 117 S. Ct. 544 (1997).

[38] Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

[39] *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986).

[40] *Johnson*, 117 S. Ct. at 1549.

[41] The Supreme Court listed six structural errors in *Johnson*: 1) a total deprivation of right to counsel, *see* Gideon v. Wainwright, 372 U.S. 335 (1963); 2) lack of an impartial trial judge, *see* Tumey v. Ohio, 273 U.S. 510 (1927); 3) unlawful exclusion of grand jurors of defendant's race, *see* Vasquez v. Hillery, 474 U.S. 254 (1986); 4) the right to self-representation at trial, *see* McKaskle v. Wiggins, 465 U.S. 168 (1984); 5) the right to a public trial, *see* Waller v. Georgia, 467 U.S. 39 (1984); and 6) an erroneous reasonable-doubt instruction to a jury, *see* Sullivan v. Louisiana, 508 U.S. 275 (1993). *Johnson*, 117 S. Ct. at 1549-50.

[42] *Brecht*, 507 U.S. at 629-30 (quoting *Fulminante*, 499 U.S. at 309 (1991)).

trial process."[43] If the error is not a structural error, it is a "trial" error and subject to harmless error review.

Last term, the Second Circuit addressed the analytical approach for determining if an error was "structural." In *Yarborough v. Keane*,[44] a habeas petitioner claimed that his exclusion from a robing room conference between counsel, the judge, and a witness violated his constitutional right to be present at material proceedings and to confront witnesses against him. The defendant's attorney made no request that the defendant be brought in to attend the conference and no objection was raised in the district court.

In considering the appropriate harmless error analysis to be applied, the panel in *Yarborough* elaborated on Chief Justice Rehnquist's analysis of structural errors in *Arizona v. Fulminante*.[45] The panel did not interpret *Fulminante*'s list of structural errors as meaning "that any violation of the same constitutional right is a 'structural defect,' regardless of whether the error is significant or trivial."[46] Instead, "[t]o determine whether an error is properly categorized as structural," the *Yarborough* panel looked "not only at the right violated, but also at the particular nature, context, and significance of the violation."[47]

In applying this approach to determine whether the exclusion from the hearing was structural, the panel found that the proceeding was of minimal importance and that the witness was not significant to the case. The defendant's absence from the hearing did not "call into question the fundamental fairness of the trial" and could not fall "within *Fulminante*'s classification of structural errors."[48] Thus, the panel applied the *Brecht* standard applicable on collateral review—whether the error "had substantial and injurious effect or influence in determining the jury's verdict"[49]—to determine if the error was harmless. In light of the insignificance of the witness's testimony and the "overwhelming" evidence of the defendant's guilt,

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[43] *Id.* *See infra* text accompanying notes 63-74 for a discussion of *Johnson*.
[44] 101 F.3d 894 (2d Cir. 1996).
[45] 499 U.S. 570 (1986).
[46] *Id.* at 897.
[47] *Id.*
[48] *Id.* at 898.
[49] *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. 750, 776 (1946)).

the panel concluded that the error, if any in fact existed, was "certainly harmless."[50]

In *Peterson v. Williams*,[51] another panel considered whether a defendant was deprived of his Sixth Amendment right to a public trial because of an inadvertent courtroom closure for twenty minutes during his testimony. While a violation of the Sixth Amendment right to a public trial was listed in *Fulminante* as one of the structural errors that "defy" harmless error analysis,[52] the *Peterson* panel did not address whether the error was "structural." Instead, it applied a "triviality standard" of constitutional interpretation which looked to "whether the actions of the court and the effect they had on the conduct of the trial deprived the defendant—whether innocent or guilty—of the protections conferred by the Sixth Amendment."[53] This standard is "very different from a harmless error inquiry" because it does not dismiss an error on the grounds that "the defendant was guilty anyway or that he did not suffer 'prejudice.' "[54] The panel concluded that there was no error since there was no violation of the defendant's right to a public trial due to the short, inadvertent nature of the closure.

Peterson presents an alternative approach to *Yarborough* by holding that some de minimis events are too trivial to constitute error and thus fall outside harmless error review. Yet it may be that the differences in analytical approaches between the two cases are insignificant in terms of the ultimate outcome. The absence of the defendant from a minor non-trial proceeding in *Yarborough*, without any objection from his counsel, may not be an error under *Peterson's* triviality standard. Similarly, considering its nature, context, and significance, the inadvertent closure in *Peterson* would probably not be structural error under *Yarborough*. The closure was "1) extremely short, 2) followed by a helpful summation, and 3) entirely inadvertent,"[55] all factors suggesting that the error was not "structural" under the *Yarborough* analysis.

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[50] *Yarborough*, 101 F.3d at 899.
[51] 85 F.3d 39 (2d Cir. 1996).
[52] *See Fulminante*, 499 U.S. at 310.
[53] *Peterson*, 85 F.3d at 42.
[54] *Id.*
[55] *Id.* at 44.

Yarborough and *Peterson* both indicate that few errors are severe enough to be classified as structural. Although there is no reason necessarily to confine the class of structural errors to the six specified by the Supreme Court in *Fulminante*, it is unclear whether the Second Circuit recognizes any structural errors beyond those specified.[56] In *United States v. Taylor*,[57] the Second Circuit agreed with the defendants' argument that "if their right to exercise peremptory challenges has been denied or impaired, they need not show that the jury was biased in order to obtain a new trial,"[58] even though the right to exercise peremptory challenges is not a constitutional right. The panel ultimately held that the defendants' right to exercise peremptory challenges was not impaired and did not reach the issue of whether a finding of impairment requires automatic reversal even if no rational juror could have found the defendants not guilty. Thus, while it may be that a defendant does not bear the burden of showing a biased jury, it is not clear whether a court must reverse if there is no showing of prejudicial effect on the verdict.

In *United States v. Vebeliunas*,[59] the panel stated that a constructive amendment of an indictment[60] is a "per se violation[] of the [F]ifth [A]mendment that require[s] reversal even without a showing of prejudice to the defendant."[61] However, the panel clearly went on to apply harmless error review to determine if the defendant's conviction must be reversed. The defendant failed to object to the jury instructions challenged on appeal and the panel reviewed for plain error under Federal Rule of Criminal Procedure 52(b), which required that the defendant show the error prejudiced him.[62] The panel affirmed

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[56] *See Twenty-Sixth Annual Review of Criminal Procedure—Review Proceedings*, 85 GEO. L.J. 1463, 1495-96 & nn.2661, 2664 (1997).

[57] 92 F.3d 1313, 1325 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 771 (1997).

[58] *Id.* at 1325 n.7.

[59] 76 F.3d 1283 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 362 (1996).

[60] As defined by the court:

> A constructive amendment occurs when the government's presentation of evidence and the district court's jury instructions combine to 'modify the essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury.'

Id. at 1290 (quoting United States v. Clemente, 22 F.3d 477, 482 (2d Cir. 1994)).

[61] *Id.* (citing United States v. Clemente, 22 F.3d 477 (2d Cir. 1994)).

[62] *Vebeliunas*, 76 F.3d at 1291.

the defendant's convictions because, even if there were a constructive amendment of the indictment, the defendant failed to establish prejudice under *Olano*.

The Supreme Court's recent decision in *Johnson* casts doubt on the continuing vitality of the dichotomy between structural error and trial error. A little over three months after a Second Circuit panel stated in *Peck* that "a per se rule of reversal applies when a structural error is present at trial, even if the record contains *overwhelming* evidence of guilt,"[63] the Supreme Court held in *Johnson* that it did not need to resolve whether the failure to have a jury decide if the evidence was sufficient to satisfy a necessary element of an offense was a structural error because the record contained "overwhelming" evidence of the defendant's guilt.[64]

In *Johnson*, the Supreme Court addressed whether the failure to submit to the jury the question of the materiality of a false statement made to the government required reversal of a conviction. The defendant in *Johnson* was indicted for perjury after testifying falsely before a grand jury. At her trial, the district court instructed the jury that the element of the materiality of her false statement was a question for the court to decide. Subsequent to trial, but prior to appeal, the Supreme Court decided in *United States v. Gaudin*[65] that the failure to submit the question of materiality to the jury violated a defendant's right to have a jury determine, beyond a reasonable doubt, her guilt as to each element of the charged offense.[66] Johnson argued on direct appeal that the *Gaudin* error invalidated her conviction.

The Supreme Court rejected Johnson's argument that (1) the error was "structural" and (2) because the error was structural, it was not subject to harmless error review. Instead, the

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[63] *See Peck*, 106 F.3d at 454 (emphasis added). *See also Yarborough*, 101 F.3d at 897 ("[e]rrors are properly categorized as structural only if they so fundamentally undermine the fairness or the validity of the trial that they require voiding its result regardless of identifiable prejudice."). These Second Circuit cases merely restated what appeared to be the Supreme Court's clear rule that "[t]he existence of such defects—deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), for example—requires automatic reversal of the conviction because they infect the entire trial process." *Brecht*, 507 U.S. at 629-30.

[64] *Johnson*, 117 S. Ct. at 1546.

[65] 515 U.S. 506 (1995).

[66] *Id.* at 522-23

Court applied plain error review under Federal Rule of Criminal Procedure 52(b) as outlined in *Olano*.[67] The Court held that the first two prongs of *Olano* were satisfied because there was (1) an "error," that was (2) "plain."[68]

Despite the Court's previous indications that if an error were structural it "defied" harmless error analysis (because without correction of the error "criminal punishment may [not] be regarded as fundamentally fair,"[69]) the Court's discussion of whether the *Gaudin* error affected any "substantial rights" of the defendant under the third prong of *Olano* raises the possibility that harmless error analysis applies even in the case of structural errors. The Court declined to decide in *Johnson* if the error was a structural or a trial error. Instead, the Court concluded that even though the error might be a structural error, the defendant failed to satisfy the fourth prong of *Olano*. The Court reasoned that because "the evidence supporting materiality was 'overwhelming,' " the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[70] The Court's concluding paragraph illustrates its current emphasis on examining even serious constitutional errors for their effect on the trial verdict:

> On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[71] Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."[72] No "miscarriage of justice"[73] will result here if we do not notice the error, and we decline to do so.[74]

The Second Circuit followed *Johnson's* lead in *United States v. Knoll* by declining to resolve whether a similar error

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[67] *See supra* text accompanying notes 27-35 for a discussion of Rule 52 and the *Olano* test.

[68] *Johnson*, 117 S. Ct. at 1569.

[69] *Fulminate*, 499 U.S. at 310 (internal quotations omitted) (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986)).

[70] *Johnson*, 117 S. Ct. at 1550.

[71] *Id.*

[72] TRAYNOR, *supra* note 5, at 50.

[73] United States v. Olano, 507 U.S. 725, 736 (1994).

[74] United States v. Knoll, 116 F.3d 994, 999-1000 (2d. Cir. 1997) (quoting *Johnson*, 117 S. Ct. at 1550).

in a jury instruction was structural. In *Knoll*, the defendant was convicted of aiding and abetting the making of a material false statement to a federal agency in violation of 18 U.S.C. §§ 1001 and 1002, after assisting in the preparation of a financial statement for the United States Department of Justice which falsely stated that the person submitting the statement did not have a savings account. On appeal, the defendant challenged his conviction based on the district court's failure to allow the jury to decide the question of materiality. The Court applied the *Olano* test and concluded that the first two prongs were satisfied. The failure to submit materiality to the jury was "error" and the error was "plain" at the time of our consideration of the case. However, we declined to address *Olano's* third prong. Instead, as the Supreme Court did in *Johnson*, we ruled that the defendant failed to satisfy the fourth prong of *Olano* by showing the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." This conclusion was based on the defendant's failure to raise a plausible argument that concealing a savings account is not a material statement when provided on a form whose express purpose is to determine the availability of assets to satisfy a criminal fine.

Johnson has blurred the principal distinction between structural and trial errors, namely that harmless error analysis is appropriate for the latter, but not the former. It is too early to assess the erosion of the trial error/structural error dichotomy thus presented.

CONCLUSION

Johnson in the Supreme Court and *Yarborough* and *Peterson* in the Second Circuit illustrate how a broad principle of law may have trouble standing the test of time—in this case, even a relatively short period of time. In 1991, the Supreme Court in *Fulminante* articulated the dichotomy between "structural error" and "trial error" with only the latter subject to harmless error review. Within less than a decade, the Second Circuit, troubled by the rigidity of the dichotomy, found two different ways to hold that the type of error that the Court had termed "structural" did not require reversal of a criminal conviction. In *Yarborough*, we held that a minor deprivation of

a defendant's right to be present at his trial was in fact not "structural" and thus was subject to harmless error review. In *Peterson*, we held that a limited inadvertent closure of a trial to the public was not error at all, "structural" or otherwise. In *Johnson*, the Supreme Court expressly reserved decision on whether the failure to charge the jury on an element of the offense was either a "structural" or "trial" error, but held that, at least for unpreserved error assessed under Rule 52(b), reversal would not be required in either case in part because the evidence supporting the missing element was "overwhelming."

Whereas *Yarborough* and *Peterson* were faithful to the principle that structural error requires reversal, *Johnson* was not. Further explanation from the Supreme Court is needed to resolve at least two uncertainties: (1) whether a court's failure to charge on an element of the offense is "structural error" and (2) whether there are circumstances in which "structural error" may be subject to harmless error review, and if so, what are such circumstances.